(19)

No. 89-1905

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

WISCONSIN PUBLIC INTERVENOR, and
TOWN OF CASEY,

Petitioners,

v.

RALPH MORTIER and
WISCONSIN FORESTRY/RIGHTS-OF-WAY/
TURF COALITION,

Respondents.

ON WRIT OF CERTIORARI TO THE
WISCONSIN SUPREME COURT

REPLY BRIEF OF PETITIONERS

THOMAS J. DAWSON
Counsel of Record
Assistant Attorney General
& State of Wisconsin Public Intervenor
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-8987

LINDA K. MONROE
Counsel for Petitioner Town of Casey
121 South Hamilton Street
Madison, WI 53703

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STATEMENT OF THE CASE

Petitioners stand by the statement of the case in their brief on the merits, and adopt by reference the statement by the United States to the extent that it supplements Petitioners' statement.

The cited statutes, rules, and the Town of Casey ordinance cited in Respondents' Brief speak for themselves.

We disagree with the characterization that the Casey Town Board "retains absolute discretion" to approve, condition or deny applications under the ordinance. R. Br. at 5, 6. The Board is bound to exercise legal and sound discretion in the application of the ordinance, and does not claim absolute, arbitrary or unlimited discretion to act outside of the law.

With respect to the conditional approval issued to Mr. Mortier, R. Br. at 6, Mr. Mortier was granted a permit subject to the condition that he not aerially apply pesticides, and that he

apply pesticides within limited areas of his land. I Pet. App. 5-6.

ARGUMENT

I. THE CLEAR AND MANIFEST PURPOSE TEST IN PREEMPTION CASES SHOULD BE STRENGTHENED AND CLARIFIED, NOT ERODED.

Petitioners reaffirm our request to the Court to clarify the law of preemption for future guidance to the Congress and the courts. See Pet. Br. at 87-89.

A holding of preemption based on ordinary rules of statutory interpretation and mere inferences from reports of committees that do not speak for the entire Congress would only erode the clear and manifest purpose test to which this Court has so long intended to guide the courts of this nation.

If deference is to be truly and consistently given by the courts to the historic police powers of the states and their local governments, Florida Lime and

Avocado Growers v. Paul, 373 U.S. 132, 146 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), Jones v. Rath Packing Co., 430 U.S. 519 (1977), Penn Dairies v. Milk Control Comm'n, 381 U.S. 261, 275 (1943), then the "clear and manifest purpose" test of preemption should discourage, not just be a tool to resolve, continuing lawsuits that are based on mere arguable inferences of congressional intent arising from ordinary rules of statutory construction.

Throughout their briefs, Respondents and their amici (hereafter Respondents et al.) cleverly employ the technique of selectively invoking "ordinary rules of statutory construction"[1] to raise non-dispositive inferences of congressional intent not to authorize local regulation of pesticides. The intent of

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[1] E.g., R. Br. at 15, 17-19, 25, 27 n.21, 30; Cal Br. at 18 n.6.

congressional committees and individual legislators are repeatedly characterized as, and elevated to the status of, the intent of a full "Congress." R. Br. at 20-27. Inferences are totalled up to make the case of "clear preemption." Quantitative analysis has displaced a qualitative one.

Respondents et al. have assiduously avoided testing their inferences of intent against the first rule of statutory interpretation in preemption cases. That is, intent to preempt must be "clear and manifest," Rice v. Santa Fe Elevator Corp., 331 U.S. at 230, "unambiguous," and "unmistakably . . . ordained." Florida Lime and Avocado Growers v. Paul, 373 U.S. at 147. Mere inferences of congressional intent, such as those ordinarily drawn from committee reports, the fiction that all voting members know of and concur with them, and even subsequent legislative

action continue to be raised in support of an accumulative, rather than qualitative, argument of intent by Congress to preempt.

This preemption challenge succeeded in several lower courts despite the fact that Respondents and like parties cannot refute the fact that the Conference Committee and the full Congress, when they voted on FIFRA (Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §136 (1988) et seq.), voted to preempt only regulation of pesticide labels and packaging, and did not vote to preempt local regulation of pesticides.

Despite reaffirmation of the "clear and manifest" purpose rule by this Court, congressional committees and members of Congress, unable to achieve or unwilling to risk failing to obtain, clear preemption language in the laws they shepherd, can in their place skillfully plant inferences of implied preemptive

intent to increase the chance the courts will legislate what they could not. Lawyers characterize the statutes and legislative histories to raise still more inferences. The issue is no longer whether preemptive intent is clear in the law. It is whether inferences outside the law against preemption can be made more numerous than those for. Instead of the heavy burden this Court has intended to keep on those who would override "the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation," Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 716 (1985), the burden effectively remains on the defenders of the presumption. The law is in need of refinement.

This is why we ask the Court to seriously consider applying in preemption

cases an approach to determining clear congressional intent akin to that suggested by Justice Scalia in Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) (citing INS v. Chadha, 462 U.S. 919 (1983)), for determining congressional intent to create federal private rights of action. Justice Scalia's rationale for demanding a clear statement of congressional intent in the place of conflicting inferences of "implied" intent appear even more persuasive in preemption cases where the historical police powers of the states are at stake, congressional intent must be clear and unambiguous, and the judicial rule demanding clarity is so longstanding that the Congress has little excuse but to meet it when adopting laws to preempt or displace state and local authority.

> It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting

upon the same unexpressed assumptions. And likewise dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor.

I suppose all this could be said, to a greater or lesser degree, of all implications that courts derive from statutory language, which are assuredly numerous as the stars. But as the likelihood that Congress would leave the matter to implication decreases, so does the justification for bearing the risk of distorting the constitutional process. A legislative act so significant, and so separable from the remainder of the statute, as the creation of a private right of action seems to me so implausibly left to implication that the risk should not be endured.

If we were to announce a flat rule that private rights of action will not be implied in statutes hereafter enacted, the risk that that course would occasionally frustrate genuine legislative intent would decrease from its current level of minimal to virtually zero. It would then be true that the opportunity for frustration of intent "would be a virtual dead letter[,] . . . limited to . . . drafting errors when Congress

simply forgot to codify its . . . intention to provide a cause of action." . . . I believe, moreover, that Congress would welcome the certainty that such a rule would produce. Surely conscientious legislators cannot relish the current situation, in which the existence or nonexistence of a private right of action depends upon which of the opposing legislative forces may have guessed right as to the implications the statute will be found to contain.

If a change is to be made, we should get out of the business of implied private rights of action altogether.

Id., 484 U.S. at 192 (citation omitted).

If nothing else, an even stronger presumption against implied preemption should be erected in cases where congressional committees debated the issue, the Congress adopted a specifically expressed preemption provision, and Congress still did not clearly preempt the state or local authority being challenged. See Pet. Br. at 27, 87-89.

II. FIFRA DOES NOT PREEMPT LOCAL REGULATION OF PESTICIDE USE, NOR PREEMPT STATE DELEGATION OF AUTHORITY TO LOCAL GOVERNMENTS TO SO REGULATE.

Absent the manifestation in FIFRA, or in its history, of a clear congressional intent to preempt local regulation of pesticides, Respondents and their amici are here asking this Court for a ruling that would have the effect of legislating the clear preemption they apparently cannot get from the Congress.

Respondents downplay the express language of FIFRA that works against them under the "clear and manifest purpose" test, and resort to a legislative history that does not speak for the full Congress that voted on that language.

When it enacted FIFRA, Congress had preemption on its "mind." Congress did intend to preempt some state and local regulation in the pesticide arena. Where Congress did intend to preempt, it did so

affirmatively and by making the scope of its intent clear, specific and express. FIFRA §136v(b) and (c). Congress even went to the pains of providing a clear, specific and express anti-preemption provision to preface, limit and clarify the scope of the preemption intended. §136v(a). As if in conscious response to the longstanding "clear and manifest purpose" test of preemption law, the Congress spelled out the limits to which it wanted to, and politically was constrained to, go with its preemptive intent.

Where the Congress goes to such pains to adopt statutory language specifically expressing its intent, especially on a subject such as preemption where its intent must be crystal clear, the courts should be especially hesitant to imply intent that does not follow necessarily from the intent expressed, is not

necessary to fulfill the intent expressed, and against which the law militates, as it does against preemption.[2] This is consistent with the rule that implied intent to preempt is not lightly to be presumed or inferred, especially where, as here, the state or local regulation relates to health and safety concerns which have been "primarily, and historically, a matter of local concern." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. at 719.

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[2]It is only "[i]n the absence of express preemptive language, Congress' intent to pre-empt all state (and local) law in a particular area may be inferred" from various sources. Hillsborough at 713 (emphasis added); Pacific Gas & Electric v. St. Energy Resources Conserv., 461 U.S. 190, 203-04 (1983); Schneidwind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1988). Here there is no such absence. There is express, clear and specific preemptive language in FIFRA at §136v. Thus, an externally derived inferred intent that goes beyond or which potentially conflicts with language that was carefully expressed by the Congress on preemption generally should not be inferred at all.

Contrary to Respondents' claims, the limits of the full Congress' intent to preempt can be found in the express provisions of FIFRA.

The express preemption provision of FIFRA is §136v(b). It is what the full Congress voted on and enacted. It means what it says. It clearly preempts states (and necessarily local governments) from enacting pesticide labelling and packaging regulations. Clearly, Congress did not want any level of state government, including local governments, to interfere with or adopt different regulations on pesticide labelling and packaging. §136v(c) further sets limits on state (or local) regulation affecting pesticide registration.

The anti-preemption provision of FIFRA the full Congress voted on, §136v(a), also means what it says. Contrary to Respondents' view, it does not

suggest local governments are preempted, or that the states are preempted from delegating independent or specific authority to regulate pesticides. It is not even a preemption provision. It contains no preemption language. It expressly precludes preemption of state regulation of pesticide sale and use. It expressly allows states to exercise their preexisting sovereign authority to regulate sale and use of federally registered pesticides and, presumably, to choose how that authority is to be exercised. Its allowance of state regulation does not exclude, much less preempt, local regulation. It preempts only state (and obviously local) authorization of pesticide uses that are prohibited by FIFRA.

There is nothing in FIFRA's express language, especially §136v(a), that would lead a common sense reader, including

congressional representatives who voted on it, or local government officials and state legislators acting on it, to conclude that Congress has unequivocally, clearly, or manifestly ordained the preemption of state delegation to their local governments of authority to regulate pesticide use.

As for FIFRA §136v(a)'s history, despite the interpretations of non-adopted FIFRA bills by individual congressional committees and legislators disposed to preempt local regulation, there is no evidence that upon voting on the final legislative package, the full Congress acted with other than the knowledge that the full Senate/House Conference Committee envisioned a very specific provision that preempted regulation of labelling and packaging [§136v(b)], and neither it nor the anti-preemption provision of FIFRA [§136v(a)] went further to expressly or by

necessary implication preempt state authorized local regulation of pesticide use. There is no finding to be made that the Congress of the United States preempted local regulation of pesticide use in FIFRA, much less that preemption of local pesticide regulation was the "clear and manifest purpose of Congress." Rice, 331 U.S. at 230; Florida Lime and Avocado Growers v. Paul, 373 U.S. at 142, 147. That is unless select congressional committees now speak "clearly" for the full Congress assembled.

Respondents et al. hold true to their characterizations of the case, including to their theme that Congress did not clearly "authorize" local pesticide use regulation. Yet, the issue remains whether the full Congress by adopting FIFRA's language clearly and unmistakably preempted local regulation of pesticides. Silkwood v. Kerr-McGee, 464 U.S. 238, 255,

reh. den., 465 U.S. 1074 (1984). It did not.

III. BASING PREEMPTION ON THE LANGUAGE AND HISTORY OF FIFRA §136v(a) IS FUNDAMENTALLY WRONG.

The cornerstone of Respondents' preemption argument is FIFRA §136v(a). They argue the term "State" as used in this section, and the section's legislative history, evince an intent to authorize "State" regulation of pesticide use, and thus not to authorize (and thus preempt) local regulation of pesticide use. R. Br. at 14.

Aside from having to make the above two leaps of logic to get to their conclusion, the most fundamental flaw of attempting to extract preemptive intent from either the words or history of FIFRA §136v(a) is that this section is not a preemption provision at all. By its express terms, it says a state "may regulate" federally registered pesticides

so long as the state does not authorize federally prohibited uses. There is no way anyone employing a common sense reading of it, including members of Congress who voted on it, could conclude that §136v(a) clearly preempts anything other than the authorization by a state of a federally prohibited pesticide use. §136v(a) is an "anti-preemption" provision that clarifies Congress' intent to insulate the great remainder of state regulation that is not expressly preempted by §136v(b) and (c).[3]

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[3]Respondents' miserly concession that FIFRA allows states to "impose stricter pesticide restrictions to account for sensitive local conditions under §136v(a)," R. Br. at 42 (footnote omitted), grossly understates the states' authority to regulate pesticides. States may regulate, even prohibit, pesticides for a wide variety of reasons that go beyond local needs. Respondents' assertion is typical of the mischaracterization that state and local governments are broadly preempted by FIFRA except where §136v(a) "authorizes" only "State" regulation.

§136v(a) is no foundation on which to base a preemption argument, whether the argument is based on the section's legislative language or history. See also U.S. Br. at 13-14.

IV. LOCAL REGULATION OF PESTICIDE USE DOES NOT CONFLICT WITH FIFRA.

Respondents argue local regulation of pesticides "conflicts" with FIFRA because it stands as an obstacle to the FIFRA's intent to foster the goals of coordinated pesticide regulation, effective regulation of pesticides, and avoiding an undue burden on interstate commerce. R.Br. at 37-48. The Court has heard and rejected similar complaints before. Hillsborough, 471 U.S. at 720-22.

First, this is but an extension of Respondents' argument that local regulation is inconsistent with the intent of FIFRA. A policy favoring preemption is offered without adding to the resolution

of the question whether Congress unmistakably did preempt local regulation in an expressly unpreempted field.

Second, we find it ironic that these claims are made in a case where application of the local regulation did not ban or obstruct pesticide application, but merely required after careful deliberation that it be done on the ground rather than by aircraft. I Pet. App. 5-6. Rather than banning pesticide use, the Casey ordinance requires the submission of information on which intelligent permit decisions can be made, and takes into account the needs met and benefits provided by pesticide applications. II Pet. App. 7-11. The ordinance is facially reasonable and does not conflict with the express provisions or policies to be fostered by FIFRA, and certainly does not conflict with effective pest control.

Third, it does not follow that nonuniform local regulation causes unacceptable conflict. FIFRA §136t(b) commands the EPA Administrator to coordinate regulatory activities with local governments and pursue the goal of uniformity through cooperation, not by federal override. While coordination and uniformity are goals of FIFRA to be strived for, Congress contemplated they must be achieved through cooperation, and therefore uniformity may not always be achieved.[4]

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[4]As California et al. correctly concede, "even if Congress has not occupied the field, state and local regulation may be preempted if such regulation 'conflicts' with federal law, assuming that Congress has not chosen to tolerate such conflicts." Cal. Br. at 4 (citations omitted, emphasis added). See Pet. Br. at 72-73 n.72. Congress obviously has chosen to tolerate the conflicts that come with state regulation of federally registered pesticides, FIFRA §136v(a). There remains inadequate intimation Congress drew the line at local regulation.

Fourth, Respondents allege, but do not show precisely how, local regulation of pesticide use renders compliance with federal law a "physical impossibility," Florida Lime, 373 U.S. at 141, or stands as a complete "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in FIFRA. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Hillsborough, 471 U.S. at 713. Clearly, the Casey ordinance does not, and local regulations may not, authorize pesticide uses prohibited under FIFRA [s. 136v(a)]. They may not regulate in the preempted field of labelling or packaging [s. 136v(b)], or interfere with special registration requirements [§136v(c)]. Where they might, such actions would be subject to traditional notions of conflict

preemption, would be invalid as applied, and must yield to the federal law.[5]

Fifth, the conflict claims here closely parallel those made and rejected in Hillsborough. First, the Court rejected as unpersuasive evidence of conflict adduced at hearing, 471 U.S. at

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[5] The argument that a holding in favor of local governments would give them license to act "without regard to the regulations already enacted and enforced at the federal and state levels," Lawn Care Asso. Br. at 1, is specious. Neither Petitioners nor their amici suggest that local governments are free because of FIFRA to override or interfere with affirmative federal or state actions taken under authority of superseding federal or state laws that would prevail under traditional conflict preemption law. Thus, neither the states nor the federal government have anything to fear where, for example, acting pursuant to superseding state or federal laws, government authorities respond in emergencies to outbreaks of gypsy moths, fruit flies, or other health or economically threatening pests. In such cases, conflict preemption principles would negate the individual application of local ordinances, just as FIFRA §136v(a) would negate state authorization of a federally prohibited pesticide.

720-22, evidence of a kind that does not even exist in this case. See this Br. at 30-31. Second, the Court observed that because the federal law and regulations there "establish minimum safety standards," and Congress had not "struck a balance between safety and quantity [of blood plasma]," the Court had no reason to believe reduction in plasma quantities would make the supply "'inadequate.'" Id. at 721. Similarly, FIFRA establishes minimum safety standards, without expressly articulating a balance between pesticide safety and use that must be maintained by non-preempted state regulation. Under FIFRA §136v, States may totally ban or restrict federally registered pesticide uses, which they have. E.g., see sec. 94.707, Wis. Stats. Third, as the "FDA possesses the authority to promulgate regulations pre-empting local regulation that imperils the supply

of plasma," id. at 721, so too may Congress and state legislatures preempt local regulation of pesticides, although not as readily as FDA. Lastly, because of "the significance we attach to the lack of a statement from FDA," id. at 722, "that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal of ensuring sufficient plasma." Id. at 721. There is no lack of a statement from EPA in this case. U.S. Br. at 1. "Local regulation of pesticide use is entirely consistent with the purpose and operation of FIFRA." Id. at 6, 22.

Sixth, a ruling against preemption will not, as some argue (Cal. Br. at 12-13), authorize local governments to enact pesticide regulations over the objections, laws, or actions of the states or federal

government.[6] The Congress and the state legislatures, like California's,[7] would

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[6]The fear that under such a holding "states would be unable to preempt or otherwise restrict local regulation, because the states presumably cannot deny authority to local governments that Congress has expressly granted," Cal. et al Br. at 13, of course, is unfounded. As creatures of state legislatures, local governments draw their authority solely from their states, and under our federal system cannot draw authority from the federal government. This unfounded fear points to the misunderstanding that comes from mischaracterizing FIFRA's anti-preemption clause [§136v(a)] as "authorizing" state regulation to the exclusion of local governments. §136v(a) does not authorize, in the sense of granting power, to states or local governments. Clearly, it merely clarifies the limits of the preemptive intent of §136v(b) so as not to preempt authority already possessed by states and local governments to regulate in the field.

[7]People ex rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P.2d 1150 (1984), certainly was not "overruled" by the California Legislature as claimed. R. Br. at 28-29; Cal. Br. at 10 n.8. First, the California Legislature did nothing to affect or change the California Supreme Court's ruling on federal preemption under FIFRA. The Legislature adopted a new state law to preempt local regulation of pesticide use under existing state law. Second, the California Legislature did not "overrule"

(continued...)

remain free to adopt, as several states have, policies and laws that retain, preempt, limit, override, coordinate or make uniform various forms of local pesticide regulation. There are many ways, short of preempting local regulation, that the Congress and the states can respond to adjustments that

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[7](...continued)
the California court decision even on the state preemption question. The court correctly ruled that neither the existing federal nor state law evinced with sufficient clarity an intent to preempt. The court properly deferred to the Legislature's existing grant of broad authority to local governments to enact police power ordinances. Faced with the Mediterranean fruit fly outbreak, the Legislature changed the state law, as is its prerogative, by expressly preempting the local regulation at issue. The Legislature's action is perfectly reconcilable with the court's ruling on the previous status of the law, and therefore did not "overrule" the court decision. In California, the law of preemption worked. It should be allowed to work the same way here. As in California, state legislatures retain the same power to preempt local regulation of pesticides, and may do so with the speed and clarity seen there. The courts should not, and need not, legislate preemption for them.

might need to be made arising out of regional, county, or municipal pesticide regulation. For example, state laws may require that where local governments wish to enact pesticide lawn posting or wellhead protection zoning ordinances they must conform to a uniform ordinance developed by a state agency. Respondents would deprive states and local governments of their authority to make adjustments that would balance state and local interests.

Seventh, at best Respondents' conflict arguments are policy arguments why Congress should have preempted local governments. At worst, they are a veiled attempt to give this Court reason to legislate the clear statement of preemptory intent Respondents et al. could or did not obtain from the Congress in FIFRA and from other state legislatures. This is a prerogative that only the

Congress and the states have, and to which they may readily avail themselves. Arguments that local governments lack necessary expertise,[8] may interfere with "a coordinated national program," and take action without adequate consideration of state and regional interests, R. Br. at 37-47, are typical complaints that can be levelled against all forms of local regulation. They are more appropriately directed to Congress and state legislatures to strike the "balance" that is appropriate. They add nothing to the determination whether Congress in fact had the unmistakably clear or specific intent to preempt that is required in the preemption analysis.

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[8]Many local ordinances do not require special expertise for their drafting or administration. Where they do, local governments can obtain expertise from their own citizens, extension services, land grant colleges, or even hire it where necessary.

The law of preemption should be allowed to work as it has always been contemplated. If due to the policy arguments presented by Respondents the majority of Congress truly wishes to preempt local regulation of pesticides, then it has within its power to make that intent clear. At present, it is not.

V. THE SPECULATIVE CLAIM THAT LOCAL REGULATION OF PESTICIDES COULD CREATE AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE DOES NOT MAKE A CASE FOR PREEMPTION.

First, the original interstate commerce claim of Respondents in this case was never addressed by the Wisconsin courts and is not properly at issue in this review. See Pet. Br. at 9 n.3; 60, n.15; 61. Even if it were, the question is a combined legal and factual one that only may be resolved after an evidentiary hearing. Hillsborough, 471 U.S. at 720-21; Hughes v. Alexandria Scrap Corp., 426

U.S. 794, 830-31 (1976) (Brennan, J., dissenting); Southern Pacific Co. v. Arizona, 325 U.S. 761, 770-71 (1945). Petitioners dispute the factual claims of Respondents and their amici that ordinances unreasonably interfere with interstate commerce or that local regulation of pesticides is inherently inimical to it.[9]

Second, the actual commerce claim raised for the purposes of this review is that local regulation of pesticides is an obstacle to a claimed policy goal in FIFRA to avoid undue burdens on interstate commerce. R. Br. at 46. This adds nothing to help resolve the issue at hand, however. This assertion is one step removed from the issue whether the full

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[9]Respondents must "overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation," Hillsborough, 471 U.S. at 716, and the burden may not be overcome by unsubstantiated speculation. Id. at 720.

Congress clearly preempted local regulation. The issue is not whether policy can be found to justify the claimed preemption. That the record shows the same committees and legislators who wished to preempt local regulation wished to do so to avoid burdens on interstate commerce does not demonstrate the full Congress clearly did adopt such a policy, or that Congress sufficiently acted to preempt local regulation in furtherance of that policy.

It is not a foregone conclusion that Congress always intends to preclude all interferences with interstate commerce. It may choose to "redefine the distribution of power over interstate commerce . . . (and) permit the states to regulate commerce in a manner which would otherwise not be permissible." Southern Pacific Co. v. Arizona, 325 U.S. at 769. Congress may, as it did in FIFRA §136v,

authorize state actions that may interfere with interstate commerce over which the Congress has superior regulatory dominion. Northeast Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 174 (1985). Thus, congressional intent to adopt the policy espoused by Respondents is not to be presumed, and no clear showing of preemption to carry out the policy has been made.

Third, that local regulation speculatively "could" increase crop loss, "could" impose administrative costs, "could" impose burdens on interstate commerce, R. Br. at 47, is hardly grounds for overcoming the presumption that local, state and federal regulation in the field can coexist. In real Commerce Clause cases, "an adequate record containing the relevant factual material which will afford a sure basis for an informed judgment is required . . . . Such a record

is lacking in the instant case." Hughes v. Alexandria Scrap Corp., 426 U.S. at 830-31 (Brennan, J., dissenting) (citations and quotations omitted), citing Southern Pacific Co. v. Arizona, 325 U.S. at 761. See also Pet. Br. at 9 n.3; 60 n.15.

Fourth, "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." Northeast Bancorp, 472 U.S. at 174. FIFRA §136v(a) expressly "authorizes" continued state regulation of pesticide use. State regulation is invulnerable to Commerce Clause attack. Local regulation of pesticides is similarly invulnerable to Commerce Clause attack where, as here, Congress' authorization of state pesticide regulation normally presumes the right of states to delegate their pesticide regulatory authority to their local

governments, or where local governments have not been clearly preempted or clearly excluded from §136v(a)'s anti-preemption protection.

VI. THAT STATES REMAIN FREE TO ASSIGN STATE REGULATORY PROGRAMS TO LOCAL GOVERNMENT ADMINISTRATION DOES NOT LEAD TO THE CONCLUSION THAT LOCAL GOVERNMENTS MAY NOT INDEPENDENTLY REGULATE PESTICIDES.

Despite citations to congressional reports that demonstrate individual committee interpretations of FIFRA "as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and regulation of pesticides," R. Br. at 21-22 (emphasis deleted and retained in part), Respondents curiously assert for the first time in the history of this case the fallback position that Congress did not intend to completely preempt local regulation after all.

California et al. argue "that Congress preempted local governments from regulating pesticide use does not necessarily mean that Congress preempted the states' authority to delegate authority to local governments to administer the state's own regulatory program." Cal. Br. at 20 (emphasis added). This non-committal statement suggests somehow Congress made the distinction in FIFRA to preempt "independent" local regulation of pesticide use, but not to preempt local regulation that is part of a state regulatory program, or local regulation having only "incidental" effect on pesticide regulation. R. Br. at 14, 31-36, California et al. Br. at 20.

First, it is difficult enough to make a case of clear congressional intent to preempt out of the anti-preemption provision in FIFRA §136v(a), without heaping on top of it the tortured

assertion that Congress went further in FIFRA §136v(a) to clearly preempt only "independent" local regulation of pesticide use (while surgically exempting locally administered state regulation). Proponents of this theory of partial preemption cite no evidence in the express language of FIFRA's preemption/anti-preemption section or in the legislative history of FIFRA to support it. Although not adequate to demonstrate a full congressional intent to preempt, the intentions stated by the congressional committees that supported preemption was for total preemption of local regulation. R. Br. at 21-24, 26. There is no evidence that even suggests the congressional committees or the full Congress considered, much less adopted, a distinction in FIFRA §136v between preemption of "independent" local regulation of pesticides, while

authorizing local administration of state pesticide regulatory programs. The claim is baseless.

Second, the argument that Congress intended there to be a distinction between permissible specific v. impermissible general delegation of authority from states to local governments to regulate pesticides boils down to what Respondents, and some of their amici, wish the Congress had adopted as a matter of policy and law. Apparently wishing to eat their cake and have it too, Respondents essentially ask this Court to legislate a policy position never considered by the Congress. There is no intimation, let alone a clear and manifest one, in the record cited by Respondents to support such a distinction. Nor is there any intimation Congress considered preempting local zoning or other regulation having more than "incidental regulatory effect on

pesticides." R. Br. at 14. The issue returns to whether Congress clearly spoke with one voice in preempting states from allowing their local governments, pursuant to specific or general delegation of authority, to regulate pesticide use. It did not.

Third, California et al. argue the non sequitur:

> [T]he Tenth Amendment does not, we believe, preclude Congress from restricting distribution of legislative power where the state does not establish its own regulatory program, and instead transfers its regulatory authority to local governments . . . .

Cal. Br. at 22.

No basis in law for this unique position is offered, nor is there basis in logic for the distinction it attempts to draw. We know of no constitutionally-based distinction to draw for states that make the decision to allow their local governments to regulate pesticides through

a general delegation of the state's police power as opposed to a specific delegation.

California et al. cite City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), as indicative of this Court's familiarity with "distinctions between local action that is authorized under specific state delegations of authority and local action that is not so authorized." Cal. Br. at 25. But, the distinction drawn in that and attendant cases was not for tenth amendment purposes. Rather, it was one the Court recognized to fulfill congressional intent in the Sherman Act. The lesson of Lafayette supports Petitioners, not Respondents et al.

Lafayette discussed the distinction between municipalities acting on behalf of the state verses municipalities acting under general authority in the context of the issue there whether Congress intended

under the Sherman Act to regulate local governments. 435 U.S. at 391, 397, 410, 413. The cases leading up to Lafayette (e.g., Parker v. Brown, 317 U.S. 341 (1943)) make it clear that the Sherman Act has been construed as not intending to regulate states (including their municipalities acting as arms of the states), but that it does regulate municipalities where they are not so acting. "[W]e are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." Lafayette, 435 U.S. at 413 (emphasis added). Thus, the cited cases merely return us to the primary issue of FIFRA's intent to preempt local regulation of pesticides. See also id., 435 U.S. at 430, (Stewart, J., dissenting). Unlike the situation in Lafayette, there is no basis on which to conclude Congress necessarily intended to make the

distinction for preemption purposes in FIFRA that it had to have made in the Sherman Act with regard to anti-competitive activities by municipalities. Cf., Lafayette, 435 U.S. at 433 (Stewart, J., dissenting).

As to the policy underlying the Sherman Act, the Court stated in Lafayette, "To permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws." Id. at 415. This again returns us to the issue of congressional intent; specifically, whether Congress so clearly adopted a policy so discriminately against "independent" local regulation of pesticides as to lead to the inescapable conclusion that Congress clearly intended to preempt it, while at the same time carving out an exception for local

administration of state programs. Under the clear intent test, the answer is no.

Lastly, Lafayette, as in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (see Pet. Br. at 87-95), saw four Justices in dissent that legitimately question the validity of the distinction when made both in the context of the congressional legislation (Sherman Act) and of tenth or eleventh amendment analysis. 435 U.S. at 430, 432, 433, 434 (Stewart, J., dissenting). The test of state direction or legislative contemplation of activity conducted by local governments is "elusive." 435 U.S. at 435 (Stewart, J., dissenting). More importantly,

> Under our federal system, a State is generally free to allocate its governmental power to its political subdivisions as it wishes. A State may decide to permit its municipalities to exercise its police power without having to obtain approval of each law from the legislature. Such local self-

> government serves important state interests. It allows a state legislature to devote more time to statewide problems without being burdened with purely local matters, and allows municipalities to deal quickly and flexibly with local problems. But today's decision, by demanding extensive legislative control over municipal action, will necessarily diminish the extent to which a State can share its power with autonomous local governmental bodies.

Id. at 434-35 (footnotes omitted). See also, id. at 435-38; Community Commun. Co. v. City of Boulder, 455 U.S. 40, 70-71 (1982) (Renquist, J., dissenting). These are the same concerns raised by the four dissenting members of the Court in Garcia, 469 U.S. at 560, which give rise to Petitioners' tenth amendment concerns. See Pet. Br. at 90-102. The distinction raised by California et al. has no persuasive relevance either to the statutory intent of FIFRA or to the Constitutional question presented.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Supreme Court of Wisconsin and remand the matter with instructions to enter judgment in favor of Petitioners declaring valid the Town of Casey Ordinance 85-1.

Dated this 16th day of April, 1991.

THOMAS J. DAWSON
Counsel of Record
Assistant Attorney General
& State of Wisconsin Public Intervenor
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-8987

LINDA K. MONROE
Counsel for Petitioner Town of Casey
121 South Hamilton Street
Madison, WI 53703